**PPG Industries, Inc. *and* Randall Martin.** Case 10–CA–32813

November 20, 2002

## ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On December 31, 2001, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions, a supporting brief, and a reply brief. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand this proceeding to the judge for further consideration as set forth below.

The complaint alleges that the Respondent suspended and then discharged Randall Martin in violation of Section 8(a)(1) and (3) of the Act. In a bench decision, the judge found that the General Counsel established his initial burden of showing that the discharge was discriminatorily motivated, but the judge went on to find that the Respondent established a defense under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In making his findings, however, the judge failed to resolve certain evidentiary issues. In this regard, the judge failed to act on the Respondent's petition to revoke the General Counsel's subpoena for documents concerning the administration of the Respondent's attendance policy. Nor did the judge rule on the General Counsel's request that an adverse inference be drawn from the Respondent's failure to produce two classes of documents in response to the subpoena. Therefore, we will remand this case to the judge to consider: (1) whether to grant the Respondent's petition to revoke; and (2) if the petition to revoke is denied in whole or in part and the Respondent fails to produce the relevant documents, whether an adverse inference should be drawn.[1]

### ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge William N. Cates for the purposes described above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.[2]

MEMBER COWEN, dissenting.

The majority would remand this case for the administrative law judge to consider whether to grant the Respondent's petition to revoke the General Counsel's subpoena for documents concerning the administration of the Respondent's attendance policy, and, if the petition to revoke is denied in whole or in part and the Respondent fails to produce the relevant documents, whether an adverse inference should be drawn. I do not believe that a remand is appropriate because, as more fully discussed below, it was the General Counsel's responsibility to ensure that the judge ruled on the petition to revoke the subpoena at the original hearing, an adverse inference should not be drawn unless the General Counsel has sought court enforcement of the subpoena, and because in any event the Respondent has already provided the General Counsel with documents relevant to the disparate treatment issue on which the General Counsel's subpoena is focused.

The relevant facts can be summarized as follows. The Respondent discharged Randall Martin following his unexcused absence from work on June 9, 2000.[1] The Respondent informed Martin that, as a result of his absence, he committed two violations of the Respondent's disciplinary policies, which advanced him from step 3 to step 4 in its progressive discipline system. Step 4 was discharge. First, the Respondent explained that Martin was subject to step discipline for his absence because, at the time of his discharge, he was in the Respondent's accelerated program for absenteeism control.[2] Pursuant to this program, an employee would receive step discipline if he attained more than four unexcused absences during a 12-month period. Second, the Respondent indicated that Martin was exposed to discipline because he failed to report off before the start of his shift on June 9. The rule pertaining to reporting off provides, in relevant part, that if employee is going to be late for work or did not know in advance that he would be missing work, he should make every attempt to contact his or her supervisor.

The complaint alleges that the Respondent suspended and then discharged Martin in violation of Section 8(a)(1) and (3) of the Act. The judge found that the Gen-

[1] At this stage, we need not address our dissenting colleague's contentions, particularly where they reflect a departure from the Board's current law.

[2] In remanding this case, we are not passing on any of the other issues raised by the General Counsel's exceptions at this time.

[1] All dates are in 2000 unless otherwise specified.

[2] It was undisputed that Martin was in the accelerated program for absenteeism control. Moreover, as the judge indicates, it is not alleged that any of the absences that resulted in Martin being placed in this program were discriminatorily motivated.

eral Counsel established a prima facie showing of discriminatory discharge, but went on to find that the Respondent established a defense under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). With respect to the Respondent's affirmative defense, the judge explained that as a result of Martin's absence on June 9, he was exposed to the next level of discipline under the Respondent's procedures. Further, the judge indicated that by not calling in prior to the start of his work shift, he violated the reporting off policy, which also exposed him to discipline. Finally, the judge reviewed the record before him to find ample evidence that the Respondent established that it did not treat Martin differently than it had treated other employees.

The General Counsel issued a subpoena shortly before the hearing, which sought documents relative to the Respondent's attendance policy. In response to the subpoena, the Respondent provided the relevant disciplinary records for all employees who received step discipline for violating the Respondent's absenteeism and/or reporting off policy. These records also provide the reason that the employee received step discipline for absenteeism/failure to report off and a section for the employee, if the employee desires, to provide an explanation for his conduct. On many of these records, employees explained that their absences/failures to report off were due to medical reasons. The Respondent also produced the "Employee Absenteeism Report," which is a several hundred page printout summarizing the attendance records for all production and maintenance employees at its facility. This document shows, in relevant part, the date of the employee's absence, whether the absence was unexcused and, thus, would count toward step discipline, and whether the employee had received step discipline due to the absence.

The Respondent did not produce two classes of documents, the "Employee Action/Discipline History" (Employee Action) and "Absences with Notes" reports for employees other than Martin. The Employee Action report shows, in relevant part, an employee's entire history of discipline and the dates when offenses were cleared from the disciplinary step procedure. The Respondent introduced Martin's Employee Action form during its human resources supervisor, Joyce Spiller's testimony. Spiller testified that she printed out this document shortly after Martin's June 9 absence to examine his disciplinary record. The General Counsel objected to the introduction of this document on the grounds that the Respondent had not produced the same form for its other production employees. In response to the General Counsel's objection, counsel for the Respondent explained that it had filed a petition to revoke the subpoena, and the petition covered the Employee Action report because it was overbroad to the extent it encompassed disciplinary information for offenses other than absenteeism and failure to report off. Counsel for the Respondent noted, however, that it provided the relevant disciplinary records for employees who had been disciplined for the same infractions as Martin.

With respect to the "Absence with Notes" forms, the record reveals that these are unofficial records that are maintained in electronic form by Spiller. These forms are used by Spiller to track an employee's attendance record, and they provide, in relevant part, an employee's history of unexcused absences and indicate whether the absence counted toward step discipline. As with Martin's Employee Action report, Spiller printed out Martin's Absence with Notes report shortly after his June 9 absence. Spiller testified, and the General Counsel did not dispute, that the Respondent was unable to view or print out the Absence with Notes reports at the time of the hearing and for a number of months prior to it.

The General Counsel requested that the judge draw an adverse inference against the Respondent from its failure to produce the Employee Action and Absence with Notes forms for employees other than Martin. The judge never ruled on the General Counsel's request, nor did he act on the Respondent's petition to revoke the General Counsel's subpoena. My colleagues would remand the case for the judge to consider these evidentiary issues that he failed to address at either the hearing or in his bench decision. While I acknowledge that the judge should have resolved these issues, I would adopt his findings and find that a remand is unnecessary for the following reasons.

First, in my view, it is the General Counsel's burden to obtain the documents sought by a subpoena. As such, I believe that it was the General Counsel's responsibility to ensure that the judge ruled on the petition to revoke the subpoena and, if necessary, to have sought enforcement of the subpoena in court . There is no indication on the record that the General Counsel did either of those things. Indeed, the General Counsel rested his case notwithstanding the Respondent's failure to provide the subpoena documents and without reserving the right to supplement the record once those documents were obtained. For this reason alone, the case should not be remanded. Indeed, a remand would unnecessarily give the General Counsel another opportunity to do that which he was required to do at the unfair labor practice hearing. In addition, it is my view that in circumstances where a respondent has filed a petition to revoke a subpoena in good faith, I would not be inclined to draw an adverse

inference unless the General Counsel has obtained enforcement of the subpoena in court.

In any event, the Respondent provided the General Counsel with the relevant documents to determine whether Martin was treated disparately. In this regard, I find that the Employee Action and Absence with Notes forms would not have provided any more information with respect to the Respondent's defense than the documents produced by the Respondent in response to the General Counsel's subpoena. Like the Absence with Notes form, the Employee Absenteeism Report provides an employee's history of unexcused absences and whether the employee received discipline for the same. Therefore, this document shows whether an employee automatically received step discipline if he attained more than four unexcused absences during a 12-month period. Also, the same information could be found by cross-referencing an employee's disciplinary record for absenteeism with the Employee Absenteeism Report. As such, I reject the General Counsel's contention that only the Employee Action and Absence with Notes forms could show whether the Respondent's absenteeism policy was applied mechanically, because the produced documents provided this information.[3]

Indeed, the General Counsel's own actions demonstrate this point. At the hearing, the General Counsel questioned Spiller concerning Michael Chenoweth's attendance record to establish that he had attained the number of unexcused absences that would warrant step discipline but was not disciplined. Moreover, unlike the Employee Action and Absence with Notes reports, the produced documents address the Respondent's reporting off policy. Therefore, contrary to the General Counsel, the Respondent's failure to produce the Employee Action and Absence with Notes reports did not preclude or even restrict the General Counsel's ability to determine whether there existed any instances of disparate treatment in the Respondent's application of its policies.

Moreover, I would not remand this case because, as the judge found, the Respondent presented abundant evidence that its decision to discharge Martin was consistent with its treatment of other employees who committed the same infractions. The Respondent produced disciplinary records which establish that, between April 1999 and December 2000, it issued step discipline to 16 other employees for failing to report off before the start of their shifts and terminated 3 of those employees in addition to Martin. The records also show that, over the same period, the Respondent issued step discipline to 69 other employees for violating the absenteeism policy and terminated 4 of those employees in addition to Martin. Furthermore, these disciplinary records reveal that the Respondent applied its absenteeism and reporting off policies without regard to mitigating circumstances. In this regard, the record shows that between April 1999 and December 2000, 11 employees received step discipline for violations of the absenteeism and/or reporting off policies where the violations were due to a medical reason.[4]

Finally, I find significant the fact that, in its exceptions, the General Counsel has not argued that the case should be remanded to the judge. Rather, the General Counsel contends that an adverse inference should be drawn from the Respondent's failure to produce the Absence with Notes and Employee Action forms. Specifically, the General Counsel urges that an inference be drawn that the documents not produced would have shown the Respondent's attendance policy was not consistently enforced. I find this contention without merit.

The failure of an employer to produce relevant evidence particularly within its control allows, but does not require, an adverse inference that such evidence would not be favorable to it. *Filene's Basement Store*, 299 NLRB 183, 204 (1990); *Auto Workers v. NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972). Normally, an adverse inference may be drawn if the party's failure to produce material evidence, particularly the failure to comply with a subpoena when directed to do so, is unexplained. *Auto Workers v. NLRB*, supra at 1338. See also *Filene's Basement Store*, supra at 204.

In the instant case, I do not find that the Respondent's nonproduction of the Employee Action and Absence with Notes forms warrants the drawing of an adverse

[3] The General Counsel contends that he could have used the Absence with Notes reports and the Employee Action reports together to determine if employees were automatically disciplined for violations of the attendance policy. However, I am unwilling to reject the Respondent's unrefuted evidence that it was unable to view or print out, for a number of months, the Absence with Notes reports. Consequently, the General Counsel could not have used the Employee Action form by itself to obtain this information as this form only addresses unexcused absences which have counted toward step discipline.

[4] Contrary to the General Counsel, neither the Employee Action nor the Absence with Notes reports would indicate whether an employee's absence involved mitigating circumstances. The Employee Action report merely indicates the type of offense, such as absenteeism, and the level of discipline the employee received as a result of the offense. The form does not address the employee's explanation for the infraction. Likewise, while the evidence shows that the human resources supervisor can enter comments about an employee's particular absence on the employee's Absence with Notes form, this is discretionary, and there is no evidence to show that the comments would include the employee's explanation for the absence. This point is illustrated by Martin's Absence with Notes form in which Spiller entered a comment regarding his June 9 absence. The comment does not mention the fact that Martin's absence was the result of an attack of vertigo the preceding evening.

inference because the Respondent presented evidence explaining why these documents were not produced. First, as set forth above, the Respondent adduced evidence establishing that the Employee Action and Absence with Notes forms would not have provided any additional information relating to its defense that could not be found in the records it produced. Indeed, the Respondent provided the General Counsel with all the documents he needed to determine whether Martin was treated disparately.

Second, counsel for the Respondent explained that the petition to revoke covered the Employee Action reports because they provided disciplinary information about offenses other than absenteeism and failure to report off. Significantly, counsel for the Respondent further indicated that the Respondent had provided the disciplinary records for employees who had been disciplined for these offenses. Third, the Respondent presented undisputed evidence that it was unable to view or print out for a number of months the Absence with Notes forms. Finally, at no time did the General Counsel ask the judge to order the Respondent to produce the requested documents.

In sum, the evidence establishes that the Respondent provided the General Counsel with the necessary documents to test the Respondent's defense. From the produced documents, the General Counsel could readily ascertain which employees were disciplined for attendance violations and which were not. Moreover, the Respondent presented substantial evidence that it treated Martin in the same manner as other employees who violated its attendance and/or reporting off policies. Accordingly, I find that the record supports the judge's conclusion that the Respondent proved its *Wright Line* defense by a preponderance of the evidence, and I would adopt the judge's recommended dismissal of the complaint.

*John D. Doyle, Esq.,* for the General Counsel.
*Cameron S. Pierce, Esq.,* for the Company.
*Randall Martin,* Pro Se.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful suspension and discharge case. At the close of a 3-day trial in Huntsville, Alabama, on December 7, 2001, and after closing argument by Government and company counsel, I issued a bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and conclusions of law. This certification of that bench decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the Board.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found the Company did not on or about June 16, 2000, violate the National Labor Relations Act (the Act) when it suspended and thereafter discharge its employee Randall Martin. Although I found the Government established a prima facie case by showing Martin engaged in activities on behalf of the Unions, which activities were well know to the Company, that the Company had in the past exhibited animus toward its employees' union activities it nonetheless demonstrated it would have discharged Martin even in the absence of any union or charge filing activities on his part. The Company demonstrated its discharge of Martin was in keeping with its guidelines, policies, and practices regarding absenteeism and call-in procedures. The Company demonstrated it had consistently enforced its applicable policies and did not treat Martin differently than other employees. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S.989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 551 to 582 containing my bench decision, and I attach a copy of that portion the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed in its entirety.

APPENDIX A

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This is my decision in PPG Industries Inc., herein Company, in Case 10–CA–32813.

In this Unfair Labor Practice case, it is alleged the Company violated Section 8(a)(3)(4) and (1) of the National Labor Relations Act, as amended, herein Act.

The prosecution is brought in the name of the General Counsel of the National Labor Relations Board, herein Board, by the Regional Director for Region 10, who issued a Complaint and Notice of Hearing, herein Complaint, on May 31, 2001, after investigating a charge filed on December 8, 2000, by Randall Martin, an Individual, herein Martin or Charging Party Martin.

An answer was timely filed to the complaint on or about June 13, 2001, and the matter came to be heard before me in

[1] I have corrected the transcript pages containing my bench decision and the corrections are as reflected in attached appendix B [omitted from publication].

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Huntsville, Alabama on December 5 and 6, and I am delivering the decision on December 7, 2001.

Certain facts herein are admitted, stipulated or undisputed.

It is essential that I set forth certain of those facts at this point, which I shall now do.

It is admitted the Company is a Pennsylvania corporation, with an office and place of business located in Huntsville, Alabama where it manufactures aircraft windshields.

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During the twelve months preceding the issuance of the complaint herein, a representative period, the company sold and shipped good valued in excess of fifty thousand dollars ($50,000) directly to customers located outside the State of Alabama.

The Parties admit the evidence establishes, and I find, the Company is an Employer engaged in commerce with the meaning of Section 2(2)(6) and (7) of the Act.

The Parties admit, and I find, the International Brotherhood of Teamsters and the United Steelworkers of America, AFL–CIO, have been and are Labor Organizations with the meaning of Section 2(5) of the Act.

There are a number of Supervisors and agents of the Company whose names will surface during the facts of this case.

The Parties admit, and I find, that Director of Administrative Services Kirk Loring, Operations Superintendent Gary Dennis, Supervisor Doug Marona, Plant Manager George Ellis, Director of Human Resources George Krock, Supervisor Randy Frazier, General Manager Robert K. Moore, Supervisor Frank Riopka, Manager Frank Archinacco, and Human Resources Supervisor Joyce Spiller are Supervisors and agents of the Company, within the meaning of Section 2(11) and 2(13) of the Act.

The specific contested complaint allegations are that

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on June 13, 2000, the Company suspended Charging Party Martin from his employment with the company, and thereafter on June 16, 2000, discharged Martin, subject to appeal and thereafter, on or about June 28, 2000 upheld his discharge.

It is alleged the Company took the actions it did against Martin that I have just outlined because he engaged in Union and other concerted protected activities, and because he filed charges and/or gave testimony pursuant to the Act and, in order to discourage other employees from engaging in Union activities and other concerted, protected activities, and from filing charges and/or giving testimony pursuant to the Act.

The Company denies having violated the Act in any manner alleged in the Complaint.

In as much as this case involves the suspension and discharge of Martin, I shall outline his work history and relationship with the Company.

Charging Party Martin commenced working for the Company in April, 1989, and worked until his termination in June, 2000.

Martin worked as a Unit Reclaimer, removing scratches from aircraft windshields.

Charging Party Martin has, since 1996, suffered from vertigo. Martin explained that he, from time to time,

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suffered attacks of vertigo that caused him to be nauseous, dizzy, vomiting, and developing what is perceived as a thick tongue.

Martin testified the medication prescribed for treatment of his vertigo symptoms causes drowsiness.

Martin testified the attacks or seizures of vertigo may last from less that a day up to two months.

Martin testified he was a supporter of the United Steelworkers of American, herein Steelworkers, unionizing efforts at the Company, that culminated in an election held on or about March, 1998.

The Steelworkers lost the election.

Martin testified he took part in the Steelworkers' campaign by attending Union meetings, distributing handouts for the Steelworkers, and wearing Steelworkers hats and pins.

Teamster Local Union 402, herein the Teamsters, filed a representation petition in Case 10–RC–15052 on June 14, 1999.

Martin testified he, at first, did not support Teamsters efforts to organize the Company's employee.

Martin testified he and Plant Manager George Ellis talked in February 1999 about the Teamsters' efforts at the beginning of the Teamsters' campaign.

Charging Party Martin testified he told Plant Manager

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Ellis he was not going to participate in the Teamsters' campaign, but rather was going to give Plant Manager Ellis, who was relatively new on the job, a chance to prove himself.

Martin testified he became disillusioned with Plant Manager Ellis efforts to do as he had promised, so Martin began to actively support the Teamsters.

Martin testified he did so by attending Union meetings, handing out Union pamphlets and literature, and by wearing Union pins and shirts.

The Teamsters won the representation election held on or about August 12, 1999.

Charging Party Martin testified he appeared on Channel 19, a local Hunstville, Alabama television station, on the night of but after the Teamsters had won the election.

Charging Party Martin testified he reported for work at his regular 7 a.m. start time on August 13, 1999, and later that morning, was taken to his Supervisor's office, where he met with Supervisor Marona.

Martin testified Supervisor Marona told him he worked in a high-traffic area, and alerted Martin that tensions were running high that morning and urged Martin not to rub their noses in it.

According to Charging Party Martin, Supervisor Marona

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alerted him he was being watched, and that he had been seen out of his work area and added Martin was not to harass anyone.

Supervisor Marona, according to Martin, told him that Plant Manager George Ellis had it in for him.

Charging Party Martin testified he told Supervisor Marona he had not been harassing anyone, but had spoken to three women in another area and when they did not respond, he

asked them if they were going to speak with him, and he asserts Tina Kelly told him they would speak to him, but not to expect to hug them after he had been "hugging those niggers."

Supervisor Marona told Martin to do a good job, watch out what he did, that he was a good employee.

Charging Party Martin testified he asked for, and was granted, that afternoon off from work, because he felt tensions were high at the plant.

Charging Party Martin testified that approximately two weeks later, Director of Human Resources George Krock and Company Attorney Little spoke with him about the events of August 13, 1999, which was the day following the Teamster election victory at the Company.

Martin testified an affidavit was prepared, which he viewed and signed, setting out the meeting he had with the three women employees on August 13, in which he said

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Employee Tina Kelly made the hugging comment that I have referred to above.

Charging Party Martin testified Director of Human Resources Krock told him that afternoon that he, Martin, had lied about the racial discrimination comments, and was fired.

Martin testified he pled for his job, saying he was asked to tell the truth and was getting fired for doing so.

Martin told Director of Human Resources Krock and Attorney Little he was being watched, and that Plant Manager Ellis had it in for him.

According to Martin, the Director of Human Resources wanted the affidavit changed to where it would reflect Martin thought he had heard Tina Kelly state what he had attributed to her.

A second affidavit was prepared, or at least an additional affidavit, that added the additional words "I thought I heard" comment, and then Martin signed that particular affidavit.

Charging Party Martin testified he told Director of Human Resources Krock and Attorney Little he would not sign any affidavit unless it was true.

According to Martin, he was told he either had to sign the affidavit or lose his job.

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Charging Party Martin testified after he signed the affidavit containing the additional comments that he thought he heard Tina Kelly make, the Company gave him a Step 3 Final Warning Disciplinary action.

The action, which was dated August 26, 1999, reads in full as follows.

To Randall Martin, "In accordance with the general plant rules and disciplinary procedures, you have been found to be in violation of Section F, General Conduct, by engaging in malicious gossip.

As a result, you are placed on Step 3, Final Warning, and suspended without pay.

You are scheduled to return to work at your normally scheduled start time on Wednesday, September 1, 1999."

The evidence establishes that Charging Party Martin was given a non-disciplinary Record of Discussion on December 8, 1999, in which he was advised "this is to review with you the expectation of regular attendance.

As of 12/6/99, you are 4.0 Occurrences in the Absence Program.

Absenteeism above 4 Occurrences will trigger a Disciplinary Action, therefore you need to remain at 4 Occurrences until 12 months."

It is noted on the Record of Discussion that the last Occurrence of Absenteeism was on November 10, 1999.

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Charging Party Martin testified he was scheduled for work on Friday, June 9, 2000 at 7 a.m.

Martin testified he suffered an attack of vertigo during the night of June 8, 2000.

Martin testified he was suffering the normal symptoms of vertigo—nausea, dizziness, vomiting, and a thick or dry tongue—so he took his medication, Antirertim or Meclazene, which made him drowsy.

The vertigo attack came on, according to Martin, at about 1 a.m. in the morning.

Martin testified he woke up at 7:15 a.m. with the alarm going off at the time. Martin testified he telephoned Supervisor Marona and told him he had overslept, and that if he felt better enough he could come in to work.

Charging Party Martin testified he took a second dosage of his medicine, went back to bed and later called Marona to tell him he could not make it to work at all.

Charging Party Martin thinks this message was left on Supervisor Marona's answering machine/voice mail system.

Charging Party Martin's next scheduled work day was Monday, June 12, 2000.

Martin testified he recovered from his attack of vertigo and reported for work.

Martin was taken by Supervisor Marona to Human

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Resources Supervisor Joyce Spiller's office.

Spiller told Martin he was suspended from work, pending an investigation, that he had failed to report-off from work before his shift began on June 9, 2000, and that he had gone over the Absentee Limit of 4 Occurrences with his absence on June 9, 2000.

Charging Party Martin testified he explained he had suffered an attack of vertigo and he had contacted Supervisor Marona as soon as he possibly could. He told Human Resources Supervisor Spiller about his medication, and she insisted a copy of his medication be provided to the Company nurse, which was done at the time by copying the label from the medicine bottle, which was taken from Charging Party Martin's personal locker space at the company.

Charging Party Martin was then escorted out of the facility.

In a letter dated June 16, 2000, which Charging Party Martin acknowledges receiving, Human Resources Supervisor Spiller informed Martin he was terminated, affective June 16, 2000.

Spiller's letter advised Martin that on June 9 he had failed to report-off in accordance with the plants attendance and report-

ing policies, and as such, had advanced one Step in the Disciplinary Process, and that

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placed him at Step 4 in the Disciplinary Process.

Human Resources Supervisor Spiller also advised Charging Party Martin in his termination letter, his June 9, 2000 absence had placed him over the limit of absences, in accordance with what he had previously been placed on notice about.

Spiller then informed Martin that, in light of his previous and recent activities, he was terminated.

Spiller advised Charging Party Martin he could appeal her decision to General Manager Moore.

Charging Party Martin testified he met with General Manager Moore.

Martin testified he took the Company's attendance policy and Handbook with him to his meeting with General Manager Moore, which meeting he says took place on June 23, 2000.

Charging Party Martin testified he told General Manager Moore he had not been treated fairly, that Plant Manager George Ellis was out to get him, and that he was a good employee.

Charging Party Martin told General Manager Moore his last absence was some seven months earlier, and that it occurred in early November, 1999.

Martin explained that the early November, 1999 absence was as a result of the Company nurse sending him to a local hospital emergency room, after he suffered

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symptoms of what he thought was a heart attack.

Charging Party Martin testified he told General Manager Moore he had no control over when an attack of vertigo would come upon him, and he tried to handle it as best he could.

Martin asked General Manager Moore to consider his good work record, as well as mitigating circumstances surrounding his June 9, 2000 absence, as called for in the Company's "Attendance Control Policy".

Charging Party Martin wanted General Manager Moore to speak to Martin's Supervisor, Marona.

General Manager Moore told Martin Marona had already spoken favorably of Martin's work performance.

On June 28, 2000, General Manager Moore wrote Charging Party Martin, telling him he had discussed Martin's discharge with others, and he would allow Human Resources Supervisor Spiller's action terminating Martin to remain in effect.

Former employee Lisa Howell testified that the day following the Teamster election – that is, August 13, 1999—General Manager Ellis told her he was surprised at the outcome of the election, and he knew who supported the Union.

General Manager Ellis told Howell he was disappointed in Charging Party Martin, that Martin was at the top of his

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list of those he was disappointed with for supporting the Union.

General Manager Ellis explained one week he was at the lake with Charging Party Martin, and the next week, Martin was handing out flyers for the Teamster Union.

Ellis explained to Howell that his Supervisors supplied him with lists of those who supported the Union.

General Manager Ellis told Howell he "would get rid of everyone on the list".

Howell testified Operations Superintendent Gary Dennis spoke with her on August 15, 1999 about the Union election, and Dennis mentioned Plant Manager Ellis thought a lot of Charging Party Martin, and Martin supporting the Union disappointed Ellis.

Employee Morrow testified Operations Superintendent Dennis told her she could use any restroom in the company facility that she chose to use.

Morrow testified her immediate Supervisor, Randy Frazier, spoke with her about being out of her work area to use the restroom.

On July 8, 1999, Morrow told Frazier that Dennis had told her she could use any restroom she chose to.

Morrow testified that Supervisor Frazier told her he would check into it.

Morrow testified Operations Superintendent Dennis

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called her to his office in July 1999, and told her "here on out, it is all business until after the election. Then, go back to the way it was."

Employee Ricky Martin, who is Charging Party Martin's brother, testified his Supervisor, Frank Riopka, had talked with he and other tooling department employees about various subjects, ranging from lake houses to stock market trades to the weather and other such subjects.

Rick Martin testified that during the Teamster campaign, employee Morrow came to his department and inquired about his mother's health.

Employee Morrow told Randy Martin she had been spoken to about being in the area. Ricky Martin testified he asked Supervisor Riopka if they could no longer have visitors in the department.

Riopka told Ricky Martin no one could come into the department "lit up like a Christmas tree in support of the Union".

Ricky Martin stated Morrow wore a white "Vote Teamster" jacket.

Ricky Martin testified Supervisor Riopka met with the tooling department employees two days later, and told the crew it was his job not to allow incidents like had happened with an employee lit up like Christmas tree for

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the Union.

Employee Margaret Richards testified she was instrumental in bringing the Teamsters to the Company.

She explained she wore a Union tee shirt, went to Union meetings, handbilled and participated in other Union activities.

She said Charging Party Martin at first was reluctant to help her with the Teamsters, but later, wholeheartedly did so.

Richards testified Director of Administrative Services Loring told her on an occasion when she was handbilling in the parking lot that there might be issues with where she was located.

Richards testified that she, along with other employees, attended a meeting on August 10, 1999, at which General Manager Moore and Manager Frank Archinacco were present.

She testified Archinacco told the employees that if there was a strike, the employees would be permanently replaced.

Supervisor Doug Marona testified that Charging Party Martin reported to him and was a good worker. Supervisor Marona testified that on August 13, 1999—the day after the Teamster election—Charging Party Martin was out of his department, and he got him back into the department

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and spoke with him.

Marona told Martin tensions were high on both sides, for him to remain in his work area.

Supervisor Marona testified Charging Party Martin told him that he had tried to speak with three women employees in the plant that morning in a particular department and they would not speak with him.

According to Marona, Martin said one of the women told him they did not want him hanging around niggers and hugging on them, and then trying to talk with them.

Marona denied telling Charging Party Martin to watch his back or that anyone was out to get him.

Supervisor Marona testified he reported Charging Party Martin's comments related to the racial statements I have just spoken to, to Operations Superintendent Gary Dennis.

Operations Superintendent Dennis testified that on August 13, 1999—the day after the election—Charging Party Martin was in the plastic area, congratulating other people, and some employees reported that he was harassing them.

Dennis testified he discussed it with Charging Party Martin and asked Supervisor Marona to find out what had happened.

Operations Superintendent Dennis denied managers ever

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discussed a list of Union supporters and that, to his knowledge, Plant Manager Ellis did not have a list of Union Supporters.

He also stated he never heard Plant Manager Ellis express a desire to get rid of Union supporters.

Corporate Director of Human Resources Krock testified he was apprised of the facts surrounding Charging Party Martin's assertion that a white female employee had used the term "nigger".

Krock testified he took comments of that type very seriously, in that he was trying, on behalf of the company, to work and have excellent relationships with minority groups, that he had worked with the NAACP and other groups to that end.

Krock testified he came from the corporate headquarters at Pittsburgh, Pennsylvania to Huntsville, Alabama to personally investigate the matter.

Krock walked the facility to see where the events had taken place, and then met with Charging Party Martin.

Martin told Director of Human Resources Krock that employee Kelly had told him not to come hugging on her after he had been hugging on those niggers.

Corporate Director of Human Relations Krock then met with employee Kelly, who denied making any such comments.

The other two women present when the conversation

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allegedly took place also denied that any racial comments were made by Kelly.

Krock testified it was physically impossible for the events to have taken place in the area of the plant that Martin testified they took place in, because the employees—among other reasons—could not have seen and heard each other as contended.

Krock told Martin he did not believe Martin's version, and if Martin was lying to him, he would fire him.

Krock told Martin if he came clean and acknowledged he had not told the truth, he would let him stay and not discharge him.

An affidavit was prepared according to Director of Human Resources Krock, adding that Martin had lied about the events and he was asked to sign that affidavit in place of the one he had earlier signed, outlining the matter as indicated above.

Martin refused to sign the second affidavit, according to Krock, and they had a lengthy discussion about what ought to be done, and Krock urged Martin to come clean and tell the truth.

According to Krock, Martin asked if there was some way that the wording could be made that he would be able to sign it.

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After some working, an affidavit was prepared that stated that Martin had thought he had heard what had taken place. This affidavit, in turn, was signed by Martin.

Director of Human Resources Krock told Martin that he was going to issue him a Final Step Warning for spreading malicious gossip, and he would be suspended for three days.

Krock told employee Kelly the company had concluded she had not made any racial comments, and no action would be taken against her.

It is undisputed that Charging Party Martin was given a Record of Discussion on December 8, 1999.

Charging Party Martin signed the document, which reads in part, under the caption Documentation of Discussion, as follows.

"This is to review with you the expectation of regular attendance. As of 12/6/99, you are at 4.0 Occurrences in the Absence Program.

Absenteeism above four Occurrences will trigger a Disciplinary action.

Therefore, you will need to remain at four Occurrences until twelve months.

This is to advise you to monitor your absences and maintain regular attendance, as is required of Works 22 Employees."

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The Record of Discussion also states under Proposed Corrective Action, "No action necessary. This record of discussion is not Disciplinary. This is a notification to make you aware that you are at or very near the Absenteeism Occurrence limit."

Charging Party Martin's Supervisor Marona testified Martin was to report to work at regular time on June 9, 2000, but did not do so, nor did he call-off prior to the start of his shift.

Later in the morning on June 9, 2000, Supervisor Marona received a message from Martin which was placed on Marona's voice mail machine, stating he, Martin, was late and was not going to make it, but would be in at 11:30 a.m.

According to Supervisor Marona, Martin never called again that day, nor did he show for work.

Charging Party Martin's next scheduled work day was Monday, June 12, 2000.

According to Marona, Martin reported for work and Marona filled out a daily call-off log sheet on Charging Party Martin, because he now knew the reason Martin did not call or come in on June 9—that he had overslept due to some medication that Martin had said he was taking.

The matter was reported to Operations Manager Dennis and Human Resources Supervisor Spiller.

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Marona testified he and Human Resources Supervisor Spiller met with Martin on June 13, 2000.

Spiller talked to Martin about his absence on Friday, June 9. Spiller explained that since Charging Party Martin was at a 3rd Level Failure to Report-Off was a serious offense, and that he also missed the entire work shift on June 9, 2000.

According to Supervisor Marona, Charging Party Martin explained he had been sick, took some medication that made him drowsy, he had overslept and in fact, after taking a second dose of medication, he had slept the entire day.

Spiller asked Martin to provide the company nurse with a copy of his prescription medication, which Martin did, and Martin was suspended, pending investigation.

Operations Superintendent Dennis testified that Charging Party Martin telephoned him at his home on June 14, 2000, asking him if there was anything Dennis could do to save Martin's job.

Dennis told Martin he was a good worker, but that the matter was out of Dennis's hands.

Human Resources Supervisor Spiller testified she investigated Martin's failure to call-off and his absence on June 9, 2000, and determined that in keeping with the Company's Policies and Practices, Martin would be terminated.

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Spiller testified she sought corporate Human Resource's permission to discharge Martin.

Spiller testified failing to call-off warrants a 1-Step Disciplinary procedure, and the absence in excess of the 4 Occurrences Martin had already accumulated warranted a 1-Step Disciplinary procedure.

Corporate Manager of Industrial Relations Herman Bonno testified he reviewed the termination request on Charging Party Martin, and approved it as clearly being within the Guidelines and Practices of the Company.

Bonno testified Plant Manager Ellis played no role in the decision to terminate Martin, and that Union activities played no role in Martin's termination.

Martin was notified of his termination, both by a phone call and a letter from Human Resources Supervisor Spiller.

Spiller's June 16, 2000 letter to Martin advised him that he had failed to report-off in accordance with the plant's Attendance and Reporting Policies, and as a result, he was advanced 1 Step in the Disciplinary procedure.

Spiller also advised Martin that his absence on June 9 came at a time when he had previously been alerted that

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he should monitor his attendance and that his absence that day had resulted in a Disciplinary Step, and that the two matters, taken together, warranted his termination, effective June 16, 2000.

Martin was advised by Human Resources Supervisor Spiller that he could appeal his discharge to General Manager Moore.

General Manager Robert K. Moore testified Charging Party Martin appealed his discharge.

Moore testified his role was to ensure that the Company had made a solid investigation, that the Company had sought corporate legal advise, and that the Company's Rules and Regulations were followed.

General Manager Moore testified that he gave Martin an opportunity to tell anything that he wished to, as to what had happened to bring about his discharge.

According to Moore, Martin explained that he had been taking medication, that he had overslept, and that the previous Occurrences of Absenteeism had taken place some seven months earlier, and that at least one of the occasions had involved when he had gone to the doctor from the plant.

Moore testified that, after carefully listening to Martin's explanations and after further consultation, he upheld the discharge.

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This case, as in most cases, requires credibility resolutions. In arriving at my credibility resolutions, I state that I carefully observed the witnesses as they testified, and I have utilized such in arriving at the facts herein.

I have also considered each witness's testimony in relation to all witness' testimony, and in light of exhibits presented herein. If there is any evidence that might seem to contradict the credited facts I shall utilize, I have not ignored such other evidence, but rather have discredited it or rejected it as not reliable or trustworthy.

I have considered the entire record in arriving at the facts herein.

(In *Wright Line*[,] 251 NLRB 1083 (1980), [enfd.] 662 F.2d 899 (1st Cir. 1981)[,] cert. denied 455 US 989 (1982), approved in *NLRB* [*v.*] *Transportation Management Corp*[.,] 462 US 393 (1983)), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on employer motivation.

First, the Government must persuade the Board that anti-Union sentiment or the filing of previous charges was a substantial or motivating factor in the challenged employer conduct or decision.

Once this is established, the burden then shifts to

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the employer to prove its affirmative defense, that it would have taken the same action, even if the employee had not engaged in protected activity.

How does the Government meet its burden?

Government counsel must demonstrate, by preponderant evidence, that the employee was engaged in protected activity, that the employer was aware of the activity, that the activity or the workers Union affiliation was a substantial or motivating reason for the employer's action, and there was a causal connection between the employer's animus and its discharge decision.

The Government may meet its *Wright Line* burden with evidence short of direct evidence of motivation—that is, inferential evidence arising from a variety of circumstances, such as Union animus, timing or pretext, may sustain the Government's burden.

In the current case, it is without dispute and I find that Charging Party Martin engaged in Union activities at the Company, both in the Steelworkers campaign and in the Teamsters campaign.

I am persuaded that the Company was fully aware of the activities on the behalf of the Union by Charging Party Martin, in that Martin wore Union buttons, which Supervisors and agents of Company acknowledged seeing, and Martin participated in the distribution of literature for

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the Union at the Company's facility.

I am persuaded that Martin's Union activities were well known to the Company.

Has the Government established that the Union activity or charge filing of Martin was a substantial or motivating reason for the employer's actions.

The Government contends that the company harbors widespread animosity toward its employee's Union activities.

In support of that, the Government would rely on the testimony of certain employees such as employee Howell, who testified that General Manager Ellis told her that he knew who supported the Union, and that he was disappointed that Charging Party Martin was one of those who had supported the Union, and that he was at the top of the list of those supporting the Union.

Howell appeared to be a credible witness, and General Manager Ellis, although discharged from the Company, was not called to refute the contention.

I credit Howell's testimony that General Manager Ellis told her as I have just indicated.

I also credit Howell's testimony that Operations Superintendent Dennis told her in August of 1999 that Plant Manager Ellis though a lot of Charging Party Martin, but that Martin's supporting the Union had disappointed

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Ellis.

I also credit employee Morrow's testimony that Operations Superintendent Dennis told her in July 1999 following an incident involving bathroom privileges, that from here on out during the campaign, it would be all business until after the Union election.

Although Ricky Martin is the brother of Charging Party Martin, and perhaps would have a strong interest in seeing that his brother's case prevailed, I nonetheless credit his testimony that Supervisor Riopka told him during the campaign that a particular employee could not come into their department lit up like a Christmas tree in support of the Union.

I credit Charging Party Martin's testimony that he and Supervisor Marona had a conversation on the day following the election, and that Marona told him to remain in his work area.

I am reluctant to, however and do not credit Charging Party Martin's testimony that Marona told him that George Ellis had it in for him. I am not persuaded that conversation took place.

Has the General Counsel established his necessary burden of showing that the Company's animus toward the Union in general and toward Charging Party Martin in specific is sufficient to establish that the Company's

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discharge of him was motivated in part by his concerted protected activity or charge-filing activities?

I find that the Government has met that necessary prima-facie burden.

I shall now look to see if the Company has met its burden of demonstrating that the same action would have taken place notwithstanding any concerted protected Union or charge-filing activities on behalf of Charging Party Martin.

I am persuaded that the Company has met its burden of showing that it would have discharged Charging Party Martin, notwithstanding any activities on his behalf, and I do so for a number of reasons.

First, there is no dispute that Charging Party Martin had incurred a number of absences and had been placed on notification that his absenteeism was reaching the point where disciplinary action would take against him.

I find that there was no showing on this record that any of the absences that brought about the notification to him, that any future absences would impact his employment relationship with the Company, were unlawfully motivated.

Advance forward to June 9—there is no question that Charging Party Martin did not work on that day.

It is also undisputed that he did not call-off prior

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to the start of the work shift.

I am persuaded and find that he did, in fact, call in on June 9 and left a message on the machine of his Supervisor that he had overslept and that he would, if he could, be in by 11:30.

I find that only one call was made that day, and I do because his Supervisor testified that only one call was made, and Charging Party Martin explained more than once in his testimony that he was groggy and drowsy and was not exactly sure what took place with respect to calling in on that day.

I find that his absence on that day placed him in the Company's Disciplinary Policies and Procedures at a point where he would move to the next level and would be in a position to have discipline placed against him.

I find that he also failed to report-off and that a failure to report-off is a serious offense with this Company.

The Company presented evidence to show that it did not treat Martin any differently than it had treated other employees. Specifically, the Company demonstrated it had discharged Kristina Brawley for excessive absenteeism and a failure to report-off, which very nearly tracks the same reasons that the discipline was taken against Charging Party Martin.

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Almost tandem with this case was a failure to report-off by an employee, Loretta Solomon.

The Company demonstrated that Solomon was also discharged for a failure to report-off.

The Company demonstrated that it had terminated between April '99 and December 2000 Jason Russell for excessive absenteeism, Ricky Jones for failure to report-off, Andrew Weaver for excessive absenteeism, and Stanley Steward for excessive absenteeism, along with providing false information and insubordination.

The Government would contend that Charging Party Martin was treated more harshly than other employees, or that the Company did not give proper consideration to the seven month period of time that had lapsed between Martin's last absence and his absence on June 9.

The Government would argue that the June 9 absence was really no fault of Charging Party Martin's, and that, taken in conjunction with the fact that Martin had had an attendance record acceptable for seven months, and had an event that brought about his absenteeism on June 9 that was beyond his control, that the Company did not exercise its option of looking at that as mitigating circumstances in its absentee policies.

While the Company's Absentee Policy may be harsh and may be employee-unfriendly, and may be a policy that is

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enforced without exception as to whether you are sick, ill or otherwise, it nonetheless is not my job to address the harshness of the Company's policies.

My job is to ascertain if there has been a violation of the Act or, as the Company contends in its defense, which I find is valid, that it has followed its policies and procedures, and allowed the chips to fall as they may and lose employees such as Charging Party Martin, whom everyone asserts is a good worker.

The Government would ask that consideration be given to the fact that the Company, through its General Manager Moore, reversed the discharge of employee Solomon, who was discharged at approximately the same time as Charging Party Martin, and for essentially the same reason—a failure to report-off.

I find no comfort for the Government's case in that contention because General Manager Moore explained that part of the reason that Solomon had incurred a failure to report-off was generated by confusion—a confusion that had its source in one of the Supervisors at the Company.

Finally, the Government would ask that consideration would be given Michael – and I shall spell his last name, C-h-e-n-o-w-e-t-h—incurred absences in excess of four, and was allowed to continue to be employed by the Company.

I am persuaded that the one example brought forth by

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of the General Counsel out of the numerous ones of the policy being implemented rigidly is not helpful for at least two reasons—I am persuaded that Supervisor of Human Resources Spiller testified that A. She was not aware of these excessive absences, and had she been, and had there been no justification, she would have gone forward on that individual also.

There was an explanation that perhaps the individual was seeking Family Medical Leave Act protection and that, until it was in place, the individual continued to incur absences.

I do not know the reasons, and do not need to know the reasons.

I conclude that his case is insufficient to warrant a conclusion that the Company treated Charging Party Martin differently than it did other employees.

Having concluded that, although the Government established a prima facie case, I find that the Company met its burden of establishing that it would have discharged Charging Party Martin in any event, and accordingly, I shall dismiss the complaint in its entirety.

This record is closed.

(Whereupon, the hearing in the above entitled matter was closed at 9:20 a.m)

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***C E R T I F I C A T E***

This is to certify that the attached proceedings before the National Labor Relations Board, Region Ten

In the Matter of:

PPG INDUSTRIES, INC.

and Case No. 10–CA–32813

RANDALL MARTIN, AN INDIVIDUAL

Date: DECEMBER 7, 2001
Place: HUNTSVILLE, ALABAMA

were held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

***Joe Swiney***
OFFICIAL REPORTER